Yale University *and* Unite Here Local 33 Petitioner. Cases 01–RC–183014, 01–RC–183016, 01–RC–183022, 01–RC–183025, 01–RC–183031, 01–RC–183038, 01–RC–183039, 01–RC–183043, and 01–RC–183050.

February 22, 2017

ORDER

BY ACTING CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

The Employer's request for expedited review of the Regional Director's Decision and Direction of Election, and its request to stay the elections scheduled for February 23, 2017, or alternatively impound the ballots, is denied.

Dated, Washington, D.C. February 22, 2017

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

ACTING CHAIRMAN MISCIMARRA, dissenting.

For several reasons, I believe the Board should grant the Employer's request for expedited consideration of its request for review and to stay the elections, which have been scheduled by the Regional Director to occur in nine separate departmental bargaining units comprised of teaching fellows, discussion section leaders, part-time acting instructors, associates in teaching, lab leaders, grader/tutors, graders without contact, and teaching assistants at Yale University. The nine separate bargaining units correspond to nine University departments: English, East Asian Languages and Literature, History, History of Art, Political Science, Sociology, Physics, Geology and Geophysics, and Mathematics. I respectfully dissent from my colleagues' denial of the Employer's requests.

Section 3(b) of the National Labor Relations Act authorizes the Board to delegate its election-related powers to the Board's Regional Directors, but the Board may, upon request, review "any action" by the Regional Director, and the Board may also stay an election.[1] For the reasons stated in my dissenting opinion in *Columbia University*, 364 NLRB No. 90, slip op. at 22–34 (2016) (Member Miscimarra, dissenting), I believe the Regional Director in the instant case erroneously directed an election among students holding a variety of positions within each of the nine bargaining units. Additionally, I believe substantial questions are presented regarding whether the nine separate bargaining units are appropriate, particularly since they depart from the Board's finding of a university-wide "single, expansive, multi-faceted bargaining unit" in *Columbia University*, slip op. at 22, and other Board cases have likewise resulted in university-wide units. The instant case also gives rise to questions regarding the appropriateness of applying the Board's *Specialty Healthcare* standard[2] in a university setting.

Given the complexity of these questions, the outcome of any elections here will almost certainly remain in dispute for a substantial period of time until these issues are resolved in postelection proceedings. Thus, the instant case gives rise to the concern I expressed in *Columbia University*, supra, slip op. at 31, where I stated that the Board's processes and procedures were "especially ill suited to students in a university setting," and I explained:

> [N]ot only does a student assistant's position have a fixed duration, but the student status of the individual occupying that position may itself come to an end long before a Board case affecting him or her is resolved. Students generally attend university for the purpose of doing something else—i.e., to obtain post-graduation employment, or to go on to post-doctoral or other post-graduate studies. Moreover, it is not uncommon for students to change majors, and faculty members also come and go. In these respects, treating student assistants as employees under the NLRA is especially poorly matched to the Board's representation and ULP procedures.[3]

My colleagues deny the Employer's request for expedited consideration of its request for review and to stay

[1] Sec. 3(b) is phrased in the negative (indicating that a party's request for review shall not operate as a stay "unless specifically ordered by the Board"). I believe a stay is warranted in the instant case for the reasons expressed in the text.

[2] *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013). I disagree with *Specialty Healthcare* for the reasons I expressed in *Macy's, Inc.*, 361 NLRB No. 4, slip op. at 25–32 (2014) (Member Miscimarra, dissenting), enfd. 824 F.3d 557 (5th Cir. 2016).

[3] *Columbia University*, supra, slip op. at 31–32 (Member Miscimarra, dissenting) (footnote omitted).

the elections (or, in the alternative, to impound the ballots while seeking expedited review) based on Section 102.67(j) of the Board's Election Rule, which permits this type of "extraordinary relief"—which will be "very rarely granted"—only upon a "clear showing that it is necessary under the particular circumstances of the case."[4] However, I believe that moving forward with the elections here disregards the fundamental fact that important election-related questions will likely require many months and possibly years to resolve.[5] Moreover, because the Election Rule provides that review by the Board is optional, the Board may *never* pass on the election-related questions raised here.[6] Conversely, if the Board grants review, then having nine separate elections conducted at the present time will predictably give rise to the very situation former Member Johnson and I warned of in our dissenting views to the Election Rule, where we observed that the Board majority's "preoccupation with speed between petition-filing and the election" will create "increased delays . . . in the Board's *overall* representation process," including "[t]he period between petition-filing and the exhaustion of post-election proceedings and appeals."[7] Even putting aside my disagreement with *Columbia University* (and without reaching the Employer's position that the teaching fellows at issue here are dissimilar from the student assistants found to be "employees" in *Columbia University*), I believe all parties—particularly individuals encompassed within the nine separate bargaining units approved by the Regional Director—should be given the benefit of the Board's resolution of election-related issues before voting takes place.

Accordingly, for the reasons expressed above, I respectfully dissent.

Dated, Washington, D.C. February 22, 2017

Philip A. Miscimarra, Acting Chairman

NATIONAL LABOR RELATIONS BOARD

[4] 79 Fed. Reg. 74308, 74309, 74409 (2014). I disagree with the Election Rule for the reasons stated in the dissenting views jointly authored by former Member Johnson and me. See 79 Fed. Reg. at 74430–74460.

[5] In *Macy's*, supra, the Decision and Direction of Election was dated November 8, 2012, and the Board did not resolve relevant issues until more than 1-1/2 years later on July 22, 2014, and the related court proceedings were not resolved until June 2, 2016. See *Macy's, Inc. v. NLRB*, 824 F.3d 557 (5th Cir. 2016).

[6] Election Rule, Sec. 102.67(d), 102.69(c)(2). If the Board majority decides *not* to grant review in the instant case, the only guaranteed evaluation of relevant issues would take place in proceedings before a court of appeals if the Union prevails in the election and the Employer commits a technical refusal to bargain to obtain court review.

[7] Election Rule, 79 Fed. Reg. at 74436 (dissenting views of Members Miscimarra and Johnson) (emphasis in original).